Capital Litigation for Arizona Prosecutors

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TRENDING ISSUES

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TRENDING ISSUES: STATE AND FEDERAL COLLATERAL REVIEW

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OVERVIEW

- Background—state post-conviction and federal habeas procedures
- Effect of *Martinez v. Ryan* in state and federal court
- Recent trends in state post-conviction cases

RULE 32: BACKGROUND

- Post-conviction procedures
  - Commenced by filing notice of post-conviction relief
    - Of-right: filed immediately by the Arizona Supreme Court after direct appeal concludes (Rule 32.4(a)); counsel appointed
    - Notice tolls time for federal review
  - Petition due within 12 months of notice (Ariz. R. Crim. P. 32.4(c)(1))
    - Almost never filed within that timeframe
    - More realistic: 2-3 years notice → petition
  - Petitions limited to 40 pages
    - Almost never actually limited to 40 pages
    - Recent petitions have exceeded 200 pages in length

RULE 32: BACKGROUND

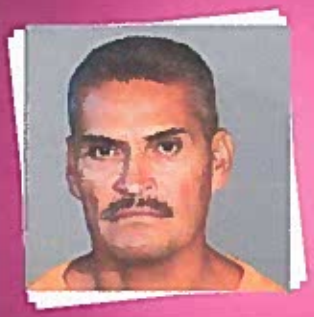
- Limited claims may be raised (Ariz. R. Crim. P. 32.1)
  - Constitutional violation in conviction or sentence (generally ineffective assistance of counsel)
  - Court lacked jurisdiction to enter judgment or sentence
  - Sentence is illegal
  - Defendant is being held after sentence expiration (exempt from preclusion under Rule 32.2(b))
  - Newly-discovered evidence (exempt from preclusion under Rule 32.2(b))
  - Request to file a delayed appeal or of-right post-conviction proceeding (exempt from preclusion under Rule 32.2(b))
  - A significant change in the law (exempt from preclusion under Rule 32.2(b))
  - Actual innocence (of either offense or death penalty) (exempt from preclusion under Rule 32.2(b))
- Preclusion: Ariz. R. Crim. P. 32.2(a)

RULE 32: BACKGROUND

- After reviewing petition, court may either (Ariz. R. Crim. P. 32.6(c)):
  - Summarily dismiss, or
  - Find colorable claims and order an evidentiary hearing
    - Adds several months to the process
    - If experts are involved (and they usually are), adds even more time than that
  - Following ruling, losing party may seek rehearing in superior court (Ariz. R. Crim. P. 32.9(a)); and/or review in the Arizona Supreme Court (Ariz. R. Crim. P. 32.9(c))
  - Arizona Supreme Court's order denying review begins federal limitations period

FEDERAL HABEAS: BACKGROUND

- 1-year period to file petition, beginning from Supreme Court's denial of certiorari on direct appeal, and tolled by post-conviction proceeding, 28 U.S.C § 2244(d)
- Should only raise claims exhausted in state court, 28 U.S.C. § 2254(b)(1)
- Should only receive relief if state court resolved exhausted claims unreasonably—deference under Anti-terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)
- Claims not raised properly in state court are procedurally defaulted and barred from federal review unless defendant shows either 1) a fundamental miscarriage of justice (actual innocence) or 2) cause and prejudice
- Procedural default was hard to overcome, until ...



MARTINEZ V. RYAN

132 S. Ct. 1309 (2012)

EFFECT OF *MARTINEZ*

- **Before *Martinez*:**
  - Ineffective-assistance-of-counsel claims not timely raised in a state post-conviction proceeding were procedurally defaulted on federal habeas
  - Inmate could not rely on post-conviction counsel's ineffectiveness to have the default set aside
- **After *Martinez*:**
  - Ineffective-assistance-of-counsel claims not timely raised in a state post-conviction proceeding are still procedurally defaulted on federal habeas, but
  - Post-conviction counsel's ineffectiveness can constitute cause to excuse the procedural default

EFFECT OF *MARTINEZ*

- ***Martinez*'s holding**
  - Did not recognize a constitutional right to effective assistance of post-conviction counsel
  - Instead, created an equitable rule
    - **When an inmate is required to raise ineffective-assistance-of-trial-counsel claims in an initial-review state collateral proceeding, counsel's ineffectiveness in the state proceeding can excuse a procedural default of an ineffective-assistance-of-trial-counsel claim on habeas**
    - **Inmate must show**
      - That post-conviction counsel's failure to raise the claim was ineffective under *Strickland*'s standards, and
      - The defaulted claim is "substantial"—meaning that it has "some merit"

EFFECT OF *MARTINEZ*

- Justice Kennedy (majority): "The holding here ought not to put a significant strain on state resources." *Martinez*, 132 S. Ct. at 1319
- Justice Scalia (dissent): "I cannot possibly imagine the basis for the Court's confidence ... that all this will not put a significant strain on state resources. ... I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system." *Martinez*, 132 S. Ct. at 1323-24.

EFFECT OF *MARTINEZ*

- Subsequent Ninth Circuit case law makes clear that the merits of the underlying trial-counsel ineffectiveness claim are relevant to finding whether post-conviction counsel was ineffective under *Strickland*
  - *Sexton v. Cozner*, 679 F.3d 1150 (9th Cir. 2012)
  - *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013)
  - *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014)
  - *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014)
- So as a practical matter, federal courts will always look at the merits of ineffective-assistance claims on habeas, where before they could dismiss the claims on procedural grounds

EFFECT OF *MARTINEZ*

- Long-dismissed claims now resurrected in federal court
- 17 cases that were nearing finality remanded from the Ninth Circuit to district court, resulting in
  - Voluminous briefing
  - Federal evidentiary hearings

EFFECT OF *MARTINEZ*

- *Martinez* does not change Arizona law, *see State v. Escareno-Meraz*, 232 Ariz. 586, 307 P.3d 1013 (App. 2013)
- But there has been a trickle-down effect in post-conviction proceedings
  - *Martinez* is used to justify additional extensions
  - *Martinez* is used to justify additional investigation
  - *Martinez* has affected the State's strategy in litigating post-conviction cases

TRENDING ISSUES: *STRICKLAND* CLAIMS

- If counsel did not present mental-health mitigation, the claim will be that they should have
- If counsel presented mental-health mitigation, the claim will be that they should have presented *different experts*, or a *different type* of mental-health mitigation
- If a defendant waived mitigation, the claim will be that he did so based on counsel's inadequate advice or investigation, or that he could not waive what he did not know existed

RECENT ARIZONA SUPREME COURT *STRICKLAND* CASES

- *State v. Kolmann*, 239 Ariz. 157, 367 P.3d 61 (2016)
- *State v. Roseberry*, 237 Ariz. 507, 353 P.3d 847 (2015)
- Upcoming decision: *State v. Pandeli*, No. CR-15-0270-PC (argued May 2016)

TRENDING ISSUE: "FALSE" OPINION EVIDENCE/DUE PROCESS

- The claim goes like this
  - One expert testified at trial (usually for the State) and made a diagnosis
  - A different expert testified at the post-conviction hearing (usually for the defendant) and made a different diagnosis
  - Defendant proclaims the trial opinion "false" and alleges that presenting it to the jury violated due process
- Relief granted on this basis in two cases (as an alternative to ineffective assistance); issue is before the Arizona Supreme Court in *Pandeli*

TRENDING ISSUE: NEWLY-DISCOVERED EVIDENCE

- Can new *opinion* evidence, discovered post-trial, state a colorable newly-discovered evidence claim under Rule 32.1(e)?
- *State v. Amaral*, 239 Ariz. 217, 368 P.3d 925 (2016)
  - Clarifies standard for hearing under Rule 32.1(e): defendant must show that evidence *probably* would have changed the outcome (as opposed to *might* have changed the outcome)
  - New scientific research did not qualify as newly-discovered evidence because it merely supplemented scientific knowledge in existence and considered at the time of sentencing

TRENDING ISSUE: COMPETENCY IN POST-CONVICTION PROCEEDINGS

- Does a defendant need to be competent to litigate his post-conviction petition and, if so, what is the standard?
- No right to be competent on federal collateral review, *see Ryan v. Gonzales*, 133 S. Ct. 696, but Arizona law is unclear
- Concerns
  - Defendant who cannot communicate with counsel may not be able to develop or raise claims, which may lead to habeas problems
  - Can defendant sign the required certification?
  - What is the level of competence required?
- Issue pending before the Arizona Supreme Court on special action (*see Fitzgerald v. Myers*, CR-16-0285)

TRENDING ISSUE: *LYNCH V. ARIZONA*

- *Lynch* claims being raised in both of-right or successive post-conviction petitions
- Is *Lynch* a significant, retroactively-applicable change in the law (*see* Ariz. R. Crim. P. 32.1(g))? If not, it is precluded on post-conviction.
- Most cases: harmless/non-prejudicial error.

TRENDING ISSUE: *BUSSO-ESTOPELLAN V. MROZ*

- 238 Ariz. 553, 364 P.3d 472 (2015)
- Holding: defendant's offer to plead guilty is relevant mitigation and cannot be precluded at sentencing
- Post-conviction claims
  - Substantive *Busso-Estopellan* claims
  - Ineffective-assistance for failing to present offer to plead guilty

TRENDING ISSUE: INNOCENCE OF DEATH PENALTY

- Rule 32.1(h) ("The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that ... the court would not have imposed the death penalty.")
- Rule is being used in successive post-conviction proceedings—when appeals are already final—to argue that additional mitigation would have altered the sentence
- Raised in two recent successive post-conviction cases; one failed and one succeeded
- Issue pending before Arizona Supreme Court on State's petition for review (*see State v. Miles*, CR 16-0021-PC)

QUESTIONS

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Trending Capital Appellate and Post-Conviction Issues

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Overview

- Intellectual Disability
- *McKinney v. Ryan*

Intellectual Disability

- (formerly called mental retardation)

Intellectual Disability

- Key cases:
  Hall v. Florida, 134 S. Ct. 1986 (2014)
  Atkins v. Virginia, 536 U.S. 304 (2002)
  State v. Grell (Grell II), 212 Ariz. 516, 135 P.3d 696 (2006)
- Cases to watch:
  Moore v. Texas, No. 15-747 (U.S. Sup. Ct.)
  State v. Escalante-Orozco, CR-13-0088 (AZ Sup. Ct.)

Atkins v. Virginia, 536 U.S. 304 (2002)

Atkins...

- Holding: the Eighth Amendment prohibits the execution of mentally retarded offenders.
- Previously, the Court had held that the Eighth Amendment did not categorically prohibit the execution of mentally retarded capital murderers. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Atkins, cont'd

- Two key reasons for the holding.
- First, the characteristics of mental retardation, *i.e.*:
  - Diminished capacity to: understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions; often act on impulse rather than pursuant to plan and are generally followers rather than leaders. *Atkins*, 536 U.S. at 318.

Atkins, cont'd

- The Court concluded that these deficiencies undermined two of the justifications for capital punishment—retribution and deterrence.
  - Lesser culpability of mentally retarded offender does not merit the most severe punishment.
  - Less likely a mentally retarded offender can process possibility of execution and, as a result, control their conduct based on that information.
- Also, reduced capacities enhance possibility of false confessions and lessen ability to make persuasive showing of mitigation, and MR criminals may be less able to assist counsel, are poor witnesses and may create unwarranted impression of lack of remorse.

Atkins, cont'd

- Second, an overview of state legislative action showed a trend toward a "national consensus" against executing mentally retarded offenders. 536 U.S. at 314-17.

Atkins, cont'd

- Significantly, the Court imposed no standards or procedures for determining MR: "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." 536 U.S. at 317.
- In other words, the Court "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].'" Bobby v. Bies, 556 U.S. 825, 831 (2009).

Arizona's Intellectual Disability Framework – A.R.S. § 13-753

A.R.S. § 13-753

- Arizona enacted its statute exempting ID offenders from the death penalty in 2001, a year before *Atkins*.

A.R.S. § 13-753

- Mandatory prescreening evaluation to test for IQ in all capital cases. A.R.S. § 13-753(B).
  - Defendant may object to prescreening, but waives right to pretrial determination of ID.
- If IQ is above 75, inquiry ends (but ID evidence may be presented as mitigation). A.R.S. § 13-753(C).

A.R.S. § 13-753

- If IQ is 75 or lower, court must appoint additional experts to evaluate defendant. A.R.S. § 13-753(D).
- If scores on all of the defendant's IQ tests are above 70, defendant does not qualify for exemption from death penalty. A.R.S. § 13-753(F).
  - But may still present ID as mitigation. *Id.*
  - Margin of error/standard error of measurement?

A.R.S. § 13-753

- Unless all IQ test scores are above 70, court must hold an evidentiary hearing. A.R.S. § 13-753(F), (G).
  - Margin of error?
- A determination by the court that the defendant's IQ is 65 or lower establishes a rebuttable presumption that the defendant has ID. *Id.*
- Defendant bears burden of proving ID by clear and convincing evidence. *Id.*
- The losing party may file a special action in the court of appeals, which *must* take jurisdiction and decide the merits. A.R.S. § 13-753(I).

A.R.S. § 13-753 - definitions

- ID consists of three prongs. It is "a condition based on a mental deficit that involves":
  1. "significantly subaverage intellectual functioning,
  2. "existing concurrently with significant impairment in adaptive behavior,
  3. "where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen." A.R.S. § 13-753(K)(3).

A.R.S. § 13-753 - definitions

- Prong 1, significantly subaverage intellectual functioning, means an IQ of 70 or lower. A.R.S. § 13-753(K)(5).
- The court *must* take into account the margin of error for the test administered when determining IQ scores. *Id.*

A.R.S. § 13-753 - definitions

- Adaptive behavior means "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group." A.R.S. § 13-753(K)(1).

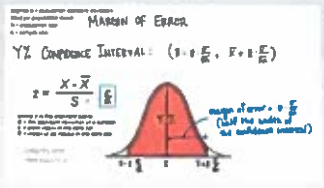
State v. Grell (Grell II), 212 Ariz. 516, 135 P.3d 696 (2006)

- In *Grell II*, the defendant challenged various aspects of Arizona's process and procedures for determining ID in capital cases.
- The court rejected each of them.

Grell II, cont'd

- Holdings:
  - Placing burden on defendant to prove ID is constitutional
  - Clear and convincing standard of proof is constitutional
    - Justice Bales dissented on this issue.
  - No right to jury determination of ID

Hall v. Florida, 134 S. Ct. 1986 (2014).



Hall, cont'd

- Issue in *Hall*: IQ scores and margin of error
- Before *Hall*, the Court specifically declined to create procedural or substantive standards for enforcing Atkins, leaving that task to the states. *See Bobby v. Bies*, 556 U.S. 825, 831 (2009).

Hall, cont'd

- Holding: Florida statute that foreclosed further evidence of ID if a defendant's IQ was above 70, without accounting for the IQ tests' margin of error, created an unacceptable risk that persons with ID would be executed, and was thus unconstitutional.
  - In other words, when a defendant's IQ test score falls within the test's margin of error (generally meaning the score is 75 or below), the defendant must be able to present additional evidence of intellectual disability, including testimony about adaptive deficits. *Hall*, 134 S. Ct. at 2001.

Hall, cont'd

- The Court's reasoning...

Hall, cont'd

- The Court's reasoning:
  A significant majority of States implement *Atkins* by taking margin of error (also called standard error of measurement) into account. *Hall*, 134 S. Ct. at 1996.
  - The Court included States that do not have the death penalty. *Id.* at 1997.

Hall, cont'd

- The Court's reasoning:
  In addition to the views of the States and the Court's precedent, its conclusion that the Florida statute was unconstitutional was "informed by the views of medical experts"—"By failing to take into account the SEM and setting a strict cutoff at 70, Florida 'goes against the unanimous professional consensus.'" *Hall*, 134 S. Ct. at 2000 (quoting Amicus Brief of the American Psychiatric Association).

Hall, cont'd

- The Court's reasoning:
  The "unanimous professional consensus" the Court referred to came from the DSM-5 and the AAIDD (American Association on Intellectual and Developmental Disabilities).

Hall, cont'd

- Effect of *Hall's* holding on Arizona?
  - Yet to be decided
  - A.R.S. § 13-753(K)(5)-"The court in determining the intelligence quotient shall take into account the margin of error for the test administered."

Hall, cont'd

- Effect on Arizona
  - A.R.S. § 13-753(C)-No exemption from death penalty if prescreen IQ higher than 75.
    - This appears to satisfy *Hall's* requirement that court's consider SEM, which generally is +/- 5 points.

Hall, cont'd

- Effect on Arizona
  - A.R.S. § 13-753(F)-No exemption from death penalty (and no evidentiary hearing) if scores on all tests are above 70.
    - Potential problem?
    - This determination should take into account margin of error/SEM

Hall, cont'd

- Effect on Arizona
  - A.R.S. § 13-753(K)(5) -"'Significantly subaverage general intellectual functioning' means a full scale intelligence quotient of seventy or lower. The court in determining the intelligence quotient shall take into account the margin of error for the test administered."

Cases to watch...

- *State v. Escalante-Orozco*, CR-13-0088 (AZ Sup. Ct.)
  - Briefed and argued—pending opinion
- Moore v. Texas, 15-797 (US Sup. Ct.)
  - Briefed—pending oral argument

Escalante-Orozco

Escalante-Orozco, cont'd

- Issues presented regarding ID:
  - Does A.R.S. § 13-753 violate *Hall*?
    - *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006) (stating statute accounts for margin of error by requiring multiple tests).
  - Is Arizona's definition of adaptive behavior constitutional in light of *Hall*?
    - How closely must the legal definition follow the medical profession?

Escalante-Orozco, cont'd

- Issues presented regarding ID:
  - Is the clear and convincing evidence standard still constitutional?
  - Must the jury be instructed on clinical definitions of ID?

Escalante-Orozco, cont'd

- Issues presented regarding ID—cross-appeal:
  - Did the trial court err by instructing the jury that if it found the defendant had ID, it was required to give a life sentence (after the trial court found he didn't have ID)?
    - "The judge hears mental retardation evidence as a legal bar to execution and the jury hears it for mitigation purposes." *Grell II*, 212 Ariz. at 527, ¶ 48, 135 P.3d at 707.

Moore, cont'd

- The issue—in finding the defendant had ID, the trial court ignored Texas' legal standard for determining ID and applied only the newest clinical definitions.
- A Texas appellate court reversed.

Suggestions

- Watch for decisions in *Escalante-Orozco* and *Moore*
- Argue defendant failed to prove ID by clear and convincing evidence and preponderance
- Use margin of error for IQ scores
- Make sure experts use clinical standards in assessing ID (most will likely do so anyway) and make that point clear at the *Atkins* hearing

McKinney v. Ryan

- *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015).

McKinney, cont'd

- Background:
  - The State cannot preclude the sentencer from considering a mitigating factor and the sentencer cannot refuse to consider, as a matter of law, any relevant mitigating evidence.
    - *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).
    - Sentencer (and appellate court on review) may determine the weight mitigating evidence should receive, but "may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15.

McKinney, cont'd

- McKinney decision:
  - In a 6–5 *en banc* opinion, the court concluded that from 1989 to 2005 the Arizona Supreme Court violated *Lockett/Eddings* by using an unconstitutional "causal nexus test" to automatically give no mitigating weight to family background or a mental condition as non-statutory mitigating factors unless the defendant established a causal connection between the background or condition and the crime. 813 F.3d at 815-17.

McKinney, cont'd

- The U.S. Supreme Court denied the State's cert petition challenging the Ninth Circuit opinion.

McKinney, cont'd

- Implications of *McKinney*?

McKinney, cont'd

- *Styers* example:
  - The Ninth Circuit gave Styers habeas relief after concluding that the Arizona Supreme Court used an unconstitutional causal nexus test to refuse to consider his PTSD as mitigation. *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008).
  - The Arizona Supreme Court remedied the error by conducting a new independent review and considering Styers' PTSD as a mitigating circumstance. *State v. Styers*, 227 Ariz. 186, 254 P.3d 1132 (2011).
  - Ninth Circuit approved. *Styers v. Ryan*, 811 F.3d 292 (9th Cir. 2015).

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